No. 421.

Brief of Crane for D. C.

Office Supreme Court
FILED.
JAN 17 1898
JAMES H. McKENNEY
CLERK

Filed Jan. 17, 1898.

(No. 12,634.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 421.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, AND E. P. HILL AND W. N. SHAW, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS TO THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

M. M. CRANE, ATTY.-GEN'L.,
Attorney for Defendant in Error.

EUGENE VON BOECKMANN PUBLISHING CO., AUSTIN, TEXAS

BLEED THROUGH

(No. 16,634.)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 421.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, AND E. P. HILL AND W. N. SHAW, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS TO THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

This suit was instituted against the Galveston, Harrisburg & San Antonio Railway Company in the District Court of Brewster County, Texas, on the 5th day of January, 1893; the pleading was amended on the 16th day of September, 1893. (Record, p. 1.)

The subject matter of the controversy was 1383 sections of land of 640 acres each, amounting in the aggregate to 879,078$\frac{1}{2}$ acres, situated in various counties in Texas therein named. The land was specifically described by the date of the issuance of the certificates, the county of the location, the survey, block and abstract number, and whether and when patented. The description of the land covers pages 2 to 33 of the record, inclusive.

POOR COPY

It was charged by the plaintiff that each of the certificates by virtue of which the land was claimed by the plaintiffs in error herein were claimed by virtue of land certificates issued by the officers of the State of Texas to the Galveston, Harrisburg & San Antonio Railway Company and the said company had caused them to be located on the land in controversy, and by reason of the location the defendant railway company had entered upon and taken unlawful possession of the land.

That Buffalo Bayou, Brazos & Colorado Railroad Company was chartered by the special act of the legislature of the State of Texas approved February 11th, 1850.

That by the special act of the legislature of the State of Texas approved February 11th, 1854, the said Buffalo Bayou, Brazos & Colorado Railroad Company and this defendant, as its successors, was restricted to an extension of its road to Austin and to a line extending thence to a connection of any road running north of Austin to the Pacific ocean.

The said railroad companies were not entitled to receive any lands for the construction of any road from Columbus to San Antonio and westward for which it received certificates as shown by said exhibits.

That by special act of the legislature of the State of Texas, approved July 27, 1870, the name of the Buffalo Bayou, Brazos & Colorado Railroad Company was changed to the Galveston, Harrisburg & San Antonio Railway Company, the defendant, and under the provisions of said special act the defendant company for the first time was granted the privilege and authority of constructing a railway from San Antonio to Columbus to the Guadalupe bridge and over the line for which certificates were issued as shown in said exhibits; and at that time the Constitution of 1869-70 forbade the legislature from authorizing or granting lands to railway companies for the construction of their roads. No land was granted by said act.

The following recitals from plaintiffs petition state the case in detail:

(5) That there issued to the defendant company 415 certificates by the Commissioner of the General Land Office numbered from 1/1 to 1/415, for a line of road from "the point of junction with the old line of the Buffalo Bayou, Brazos & Colorado

FLEED THROUG

Railroad Company, at a distance of 493 feet west of the west end of the approach to the bridge over the Colorado river, and ending at the west end of the west approach to the bridge over the west Navidad river, being 24 miles and 3910 feet of main track and 6266 feet of sidings," of which 415 certificates the 315 certificates shown in exhibit "A" form a part. That said section of road was constructed and completed between July 27, 1870, and December 19, 1873.

(6) That there were issued to the defendant company 433 certificates, numbered from 1/416 to 1/858, by the Commissioner of the General Land Office for the construction of the portion of its road "from the western sill of the western approach to the bridge over the West Navidad river, and ending at the center of a red sand stone culvert, it being the first one east of Buck branch, being 27 miles and 47 feet of main track, and 3800 feet of sidings," of which 433 certificates the 407 certificates shown in exhibit "B" form a part.

That said section of road was constructed and completed between July 27, 1870, and June 25, 1874.

(7) That there were issued to the defendant company 308 certificates by the Commissionor of the General Land Office, numbered from 859 to 1166, for the construction of the portion of its road from "a red sand stone culvert, the first one east of Buck's branch, and ending at the turn-table at Luling, being 16 miles and 4610 feet of main track, and one mile and 968 feet of sidings," of which the 308 certificates shown in exhibit "C" form the whole; that said section of road was constructed and completed between July 27, 1870, and January 16, 1875.

(8) That there were issued to the defendant company 192 certificates by the Commissioner of the General Land Office for the construction of the portion of its road between the "station house at Luling, ending at the west end of the siding at Kingsbury, being 60,922½ feet of main track, and 2767 feet of sidings and switches," of which the 91 certificates shown in exhibit "B" form a part.

That this section of road was constructed and completed between July 27, 1870, and July 12, 1875.

(9) That there were issued to the defendant company 262 certificates by the Commissioner of the General Land Office, num-

POOR COPY

bered from 1369 to 1620, for the construction of that portion of its road between "the east pier of the Guadalupe bridge, thence eastward, ending at a point opposite the depot at Kingsbury or the west end of the siding where the last inspection terminated, being 14 miles and 1510 feet of main track, and 2 miles and 686 feet of side track," which 262 certificates are shown in exhibit "E" form the whole.

That said section of road was constructed and completed between July 27, 1870, and October 27, 1876.

(10) Plaintiff further represents and shows to the court that the certificates referred to in said exhibits were issued to the defendant company for the construction of its road from the town of Columbus to the Guadalupe bridge, as heretofore shown, on the basis of sixteen sections per mile, and that every portion of said road was constructed and completed between July 27, 1870, and October 27, 1876.

That at no time during said period was there any law in existence in this State authorizing the issuance of land certificates to the defendant company for main track or sidings, and especially does the plaintiff aver and represent that—that no time during said period was there any law in existence authorizing the issuance of certificates to said company for the construction of its line of road between Columbus and the Guadalupe bridge.

Plaintiff therefore charges that the action of the Commissioner of the General Land Office in issuing and delivering to the defendant company the land certificates, and in permitting them to be located and surveyed upon the lands heretofore described and returned to and filed in the general land office of this State, as well as the issuance of patents shown in said exhibits, were, as before alleged, had and done wholly without authority of law and in plain violation of the Constitution and laws of the State of Texas in force at that time.

(12) That, by reason of the unlawful acts of said company in obtaining and holding the aforesaid certificates and in locating them upon the lands of plaintiff, it holds out to the world that it has some kind of title to said lands and a cloud is cast upon the title of the plaintiff thereto.

Wherefore the said plaintiff prays for judgment, for possession and title to the said lands, for a decree cancelling each of said

BLEED THR

certificates and patents heretofore described and removing the cloud cast upon the title by the location and survey of the same, for damages, costs, and general relief.

On the 6th day of March 1893 the Galveston, Harrisburg & San Antonio Railway Company filed a petition in the District Court of Brewster County, Texas for the removal of the case to the Federal Court and presented a bond with E. P. Hill and W. N. Shaw, as sureties.

The said petition for removal reads as follows:

"*To the Honorable District Judge of Brewster County:*

"The petition of The Galveston, Harrisburg & San Antonio Railway Company, defendant in the above stated cause, respectfully represents that said company is the sole defendant in the above entitled cause, and that the matter and amounts exceed, exclusive of interest and costs, the sum of five thousand dollars.

"That your petitioner is a corporation duly incorporated under the laws of Texas and a resident thereof, having its domicile in said State of Texas.

"That said suit is a suit of a civil nature, being a suit for the recovery of 879,078⅔ acres situated in the counties of Jeff Davis, Presidio, Brewster, Kimble, San Saba, Val Verde, Crockett, McCullough, Pecos, Buchel, Reeves, Schleicher, Sutton and Zavalla Counties.

"(2) Your petitioner further represents that the defendant is a corporation, duly incorporated under the laws of the State of Texas on the 11th day of February, 1850; that said company was invested with the right of constructing, owning, and maintaining a railway commencing at any suitable point on Buffalo Bayou between Lynchburg and Houston, in the County of Harris, and thence running by such course and to such point at or near the Brazos river between the towns of Richmond and Washington inclusive, as said company shall deem most suitable; that the corporate name of said company was The Buffalo Bayou, Brazos and Colorado Railroad Company.

"That the charter of said company was amended on the 31st day of January, 1852, by the legislature, which authorized said railway company to acquire by purchase or gift, any real estate the directors shall think desirable in order to promote or hasten

OUGH POOR COPY

the construction of said railroad. They were authorized to borrow money on their bonds or notes at such rates as shall be deemed expedient and mortgage their property to secure the same.

"That on the 29th day of January, 1853, the said railway company was by an amended act of the legislature authorized to locate, construct, own and maintain a railway commencing at a suitable point on Buffalo Bayou, in the county of Harris, and thence running by such course and to such point or points at or near the Brazos and Colorado Rivers or across the same as said company may deem advisable, with the privilege of making, owning and maintaining such branches to said road as they may deem expedient. It is further provided that there shall be granted to said company eight sections of land of 640 acres each for every mile of railroad actually completed and ready for use.

"Again, on the 4th day of February, 1854, the said charter was so amended by an act of the legislature as to entitle it to all the rights, privileges and benefits to accrue from any general law or laws that have or may hereafter be passed in this State to encourage the construction of railroads in the same manner and to the same extent as if the gauge was the same now fixed, or which may be hereafter fixed upon by this State.

"By virtue of another act of the legislature, passed February 4th, 1854, the company was required, in order to avail itself of the act to which the said act is a supplement, to accept any donation of land from the State, they shall not be entitled to receive any such donation under the provisions of this law that has been heretofore passed, on any portion of the road which has not been completed and ready for use within ten years from and after the passage of this act; provided that said company shall restrict themselves to the following route, viz., to an extension of their existing road to Austin, in Travis County, crossing the Brazos River at any point between Richmond, in Fort Bend County, and Hidalgo Falls, in Washington County, and with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific Ocean, provided such connection between the 96 and 98

FLEED THR

parallels of longitude, and provided, further, that said company shall have no right to build branches from their main line.

"Again, on the 27th day of July, 1870, an act was passed by the legislature supplementary to the act to corporate the Buffalo Bayou, Brazos and Colorado Railroad Company and to the other special acts relating to said company providing for the consolidation of its property and extending of its road. The first section of said supplementary act changes the name of the railway company, so that it should be known thereafter by the corporate name of the Galveston, Harrisburg & San Antonio Railway Company. It was provided by the third section of said act that the said company was authorized to extend the existing line of railway owned and operated by said company from Columbus, in Colorado County, to San Antonio, in the county of Bexar, within four years from the passage of this act, and thence to a terminus on the Rio Grande by such route as the directors shall deem feasible, with a branch from the most suitable point to New Braunfels, in Comal County, within four years from the passage of this act, or said new company may connect with any line of railway that may be constructed or under construction to San Antonio or the Rio Grande south of the latitude of the city of Austin and Colorado River instead of building its own line beyond the point of such connection, and may build to and connect with any line of railway that may be constructed or under construction, and it is not to form any part of any railroad line to the Pacific south of the 25th parallel of latitude, nothing therein being construed as to exclude such new company from the right to construct also any part of the line up the Colorado valley formerly designated by said sold-out company as to its route under the provisions of the 11th section of the act of December 19th, 1857.

"And further provided in section 4 that said new company may consolidate with its existing railroad the bridge built by the Brazos Iron Bridge Company over the Brazos river at Richmond, and the five miles of railroad, more or less, including said tracks from the town of Alleytown to the town of Columbus, built under the charter granted in 1860 to the Columbus Tap Railroad Company, including the bridge over the Colorado river

at Columbus, together with all the franchises, rights, fixtures, appurtenances, etc.

"It is further provided in section 8 of said supplementary act, in case it shall be made to appear to the governor that there has not been issued upon said railroad the full quantity of sixteen sections of land scrip for every mile of same that was constructed and put in running order prior to the war of the late rebellion, in accordance with the provisions of the charter and of the general laws of the State in force at the time regulating railroads, there shall be issued to said new company such scrip to the amount of any such deficiency, notwithstanding the said railroad may not have been constructed and completed at the rate of twenty-five miles each year for the construction of the first twenty-five miles, as provided in the act of January 30, 1854. It is further provided in section 11 that said new company shall be entitled to the same or similar rights and relief, except State aid in bonds or endorsement or guarantee of interest or bonds granted to or provided for any other railroad company by the legislature, and upon the same and similar terms and conditions, so far as such rights and relief are in their character applicable to said new company or its line or lines of railroads.

"Petitioner further represents that the legislature of the State of Texas, on the 13th day of November, 1866, passed an act for the benefit of railroad companies.

"The first section provided that the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended under the same restrictions and limitations provided by law, for ten years after the passage of the act.

"On the 10th day of March, 1875, the legislature passed a law whereby it granted to the Galveston, Harrisburg & San Antonio Railway Company until the 28th day of January, 1876, to complete said road to the city of San Antonio.

"The Constitution of the State of Texas, article 10, section 6, for 1869, provided as follows: 'The legislature shall not hereafter grant lands to any person, or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same and in lots not exceeding 160 acres.' An

amendment to said provision of the Constitution was voted by the people of Texas by an election held on the 5th, 6th, 7th and 8th days of November, 1872, whereby it was provided that 'the legislature of the State of Texas shall not hereafter grant lands, except for purposes of internal improvements, to any person or persons, nor shall any certificate for land be sold at the land office, except to actual settlers upon the same and in lots not exceeding 160 acres. Provided that the legislature shall not grant out of the public domain more than twenty sections for each mile completed, in aiding in the construction of which land may be granted. And provided, further: that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment.'

"The said amendment to the Constitution was, by an act of the legislature, approved March 19, 1873.

"That upon the adoption of said amendment to the Constitution, the legislature of Texas proceeded to grant to and provide for a large number of railroad rights to sixteen sections of land to the mile of completed road, as will more fully appear by reference to the special laws of the legislature, and defendant thereupon proceeded to construct its road from Columbus to the Guadalupe river, and did construct the same, relying in good faith upon the promise, agreement and undertaking of the State as fully set forth in said section 11 of the defendant's amended charter of May 27, 1870, and did from time to time receive the lands sued for as said construction proceeded and was completed in accordance with the law.

"On the 16th day of August, 1876, the legislature of the State of Texas passed a general law granting sixteen sections of land for every mile of its road completed and put in running order.

"On the 22nd day of April, 1882, the legislature of the State of Texas passed a law repealing the laws and parts of laws then in force granting land or land certificates to any person, firm or corporation or company for the construction of railroads, canals and ditches.

"Petitioner further represents that in pursuance of said laws and by virtue of the original charter granted to the said railway company, which was and became a contract with the State of Texas, and in pursuance of the law of January 30th, 1854,

ROUGH POOR COPY

and of the general and special laws of the State of Texas, and all of the charters of the said railway company,—became entitled to the grant of sixteen sections of land per mile of its said completed road, as aforesaid, for which it received the certificates for land and which it located, as fully described in plaintiff's petition.

"Petitioner further represents that its completed road, extending from San Antonio, in Bexar County, to the Rio Grande river in El Paso County, a distance of 623.14 miles; that by reason of the completion of its said road wholly within the time required by law between San Antonio and the Rio Grande river the said defendant became entiled to 9,970.24 additional certificates, calling for six hundred and forty (640) acres of land for each certificate, which would entitle the defendant company to locate 6,380,953.6 acres of land in the State of Texas, which the State declined to recognize.

"By reason of the provisions of section 6, article 10 of the Constitution of the State of Texas, withdrawing the grants of lands to railroad companies and by reason of the act of April 28, 1882, which in its effect has deprived petitioner of its land grants, as aforesaid, which it had earned, and the State of Texas, although requested through her public officers, declined to issue and deliver to said railway company the said 9,970.24 certificates aforesaid, calling for 6,380,953.6 acres of land in the State of Texas, although said railway company had completed and put in running order within the time, under the provisions of the law as aforesaid, its said railroad from Houston in Harris County, to El Paso in El Paso County.

"That the Constitution of 1869 and the act of the legislature in withdrawing the lands and depriving petitioner of its rights thereto was in violation of section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any 'law impairing the obligation of contracts,' and also in violation of section 1, of the 14th amendment of the Constitution of the United States, which provides that 'no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.'

"That said suit, instituted, as aforesaid, against this defendant

BLEED

is a suit arising under the laws of the United States, all of which, with other necessary particulars, will more fully appear from the pleadings filed and referred to as a part of this petition in like manner as if therein at length transcribed as well as herein specifically set out.

"Your petitioner further represents that this petition and bond for removal which accompanies the same was filed at or before the time when defendants are required by the laws of the State of Texas and the rule of said court in which this suit is brought to answer or plead to the complaint of plaintiff.

"Your petitioner offers herewith good and sufficient surety for entering in the Circuit Court of the United States for the western district of Texas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

"Your petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to the said Circuit Court, and to accept the said surety and bond, and to cause the record herein to be removed into the said Circuit Court of the United States for the Western District of Texas; and your petitioner will ever pray.

"T. D. COBBS, Attorney for Petitioner."

The defendant answered at length, but perhaps it is not necessary to a proper understanding of the case to insert the answer herein. It may be found in the record on pages 43 to 53, inclusive.

It would seem that a copy of the record of the case had been taken to the Federal Court for the Western District of Texas. Record, p. 54.

And that counsel for plaintiff in error objected to trial in the State court and reserved his exceptions thereto. Record, pp. 54, 55 and 56.

The plaintiff filed a supplemental petition covering pages 56 to 62 of the record, inclusive, pleading, among other things, that the defendant company was estopped by a judgment rendered in the District Court of Val Verde County, Texas, between the same parties; i. e., the State of Texas and the defendant company, in which 396,160 acres of land were involved;

HROUGH POOR COPY

it being held substantially there, that the defendant company was not entitled to the land in this case. Exceptions were filed to this answer; judgment was rendered by the District Court which had overruled protest against the court proceeding to trial on account of the case having been removed to the United States Circuit Court for the Western District of Texas at El Paso. It overruled the general demurrers to plaintiffs' petition and the plea that there was a non-joinder of necessary parties, that George F. Stone was a necessary party to the suit, and rendered judgment in all things for the plaintiff. Record, pp. 63 to 91, inclusive.

The facts as agreed to are as follows:

"I. It is agreed that the defendant company received from the State and located the certificates described in plaintiffs' petition, and that said petition contained a true statement of the number of certificates issued, the number of each certificate, the number of acres, the dates when certificates were issued, the counties in which located, the section of road for which said certificates issued, as well as the number of miles of main track and sidings in each section, and whether the same has been patented, and the date of the patents.

"II. It is further agreed that the defendant railway company begun the construction of the first section of its road, that part of its road for which certificates in this suit were issued, at the point of junction with the old line of the Buffalo Bayou, Brazos & Colorado Railroad, at a distance of 493 feet west of the west approach to the bridge over the Colorado river, and ending at the west end of the west approach over the west Navidad river, subsequent to July 27, 1870, and completed the same December 19, 1873.

"That the second section of defendant company's road from the 'western sill of the western approach to the bridge over the west Navidad river and ending at the center of a red sandstone culvert, the first one east of 'Buck's branch,' was constructed and completed between July 27, 1870, and June 25, 1874.

"That the third section of defendant company's road from 'a red sandstone culvert, the first one east of Buck's branch, and ending at the turntable at Luling,' was constructed and completed between July 27, 1870, and January 16, 1875.

BLEED TH

"That the fourth section of defendant company's road, between 'the station house at Luling and ending at the west ending of the siding at Kingsbury,' was constructed and completed between July 27, 1870, and July 12, 1875.

"That the fifth section of defendant company's road, between 'the east pier of the Guadalupe bridge, thence eastward ending at a point opposite the depot door at Kingsbury or the west end of the siding where the last inspection terminated,' was constructed and completed between July 27, 1870, and October 27, 1876.

"That portion of the road of the defendant company between the Colorado river and San Antonio was completed to San Antonio February 13, 1877.

"III. That said railroad was thereafter constructed and put in running order and operated from said beginning, at the bridge over the Guadalupe river, to El Paso, in El Paso County, being a distance of —— miles.

"IV. It is further agreed that the charters and special laws relating to the defendants' company and relating to grants of land to railroad companies may be used on the trial and in evidence and considered without the necessity of incorporating the same in the statement of facts, as well as all special laws incorporating railroads, and other laws, general and special, granting lands and land certificates for works of internal improvements.

"V. Any other pertinent fact may be introduced by either party on trial.

"VI. There are now remaining and belonging to the State of Texas —— acres of public domain, reserved since 1879 from location by certificates.

"VII. Defendant paid taxes on land sued for continuously since they were located up to the present time, which was received by the State of Texas and by it used as other taxes are used by the State.

"VIII. Defendant paid all fees for locating and surveying the said lands sued for, as well as the same number of alternate sections, known as the even numbered, for the public free school fund, and have paid all surveying fees and all fees to the Commissioner of the General Land Office in respect thereto, and all

OUGH POOR COPY

sums of money necessary for its protection and in the way of betterments for the preservation of the same, etc.

"IX. The said certificates for land described in plaintiff's petition were issued to it after the said railway company had completed and after the governor had appointed an engineer to examine the same and report; which engineer did examine the same and report to the governor the condition of said road; and thereupon the governor approved the report, and thereupon the land commissioner issued certificates to said railway company, signed by the Commissioner of the General Land Office, calling for main line and sidings, not separating the sidings from the main line.

"X. At the time the act of January 30, 1854, became a law E. M. Pease was governor of the State of Texas. It was by his approval as such governor that the bill passed the legislature and became a law.

"The first certificates that were issued under the act of January 30, 1854, were authorized and directed to be made by the said E. M. Pease, whose term of office had not then expired.

"These certificates were issued upon a report made by Tipton Walker, engineer, appointed by Governor Pease in pursuance of the provisions of said act, which report bears date, March 24, 1856, and is now on file in the proper department of the State, in the capitol, at Austin.

"In this report said Tipton Walker specially states that the railway company to whom said certificates were issued had completed of its main line a certain number of miles, and also states the length of sidings that had been constructed.

"Upon the receiving of this report the said E. M. Pease, as governor as aforesaid, in a letter addressed to Hon. Stephen Crosby, Commissioner of the General Land Office, under date of March 31, 1856, advised said Crosby, as such commissioner, that the president of the railway company making application for said certificates had notified him (the governor) that said railway company had completed and put in running order a section of twenty-five miles and more of its road; that there being no State engineer, he had appointed under the act of January 30, 1854, Tipton Walker, engineer, to examine said section of road, and that he then enclosed a copy of said report under oath, with

BLEED THROUGH

the affidavit accompanying the same, from the said engineer, wherein said engineer reported that said section, containing, (with the necessary turnouts) 32.12 miles, is constructed in accordance with the provisions of its charter and the general laws of the State in force regulating railroads.

"XI. The various engineers appointed by the different governors to inspect railways as the same were constructed, in their respective reports of inspection to the respective governors stated the number of miles and feet of main track, the number of miles or feet of sidings, the number of miles or feet of bridges, culverts, and tressels, the number of depots, cars, engines, weight of iron, and width and character of track and grade. The action of the respective governors (except Governor Roberts) on said reports were usually in the following words: 'Reports examined and approved'; upon which report and action of the respective governors the Commissioner of the General Land Office issued to the respective companies the certificates for main track and sidings. During the administration of Governor Roberts the reports of the engineers were in substance and form of those made to other governors, but he approved for only the number of miles of main track stated in the reports.

"In one instance during the administration of Governor Davis he approved one report for sidings exclusively, for which certificates were issued in the usual amount per mile. This was also done in one instance by Governor Hubbard, for which certificates issued. On March 13, 1877, Governor Hubbard made the following indorsement on one of his reports: 'This report of Inspector Gray examined and approved for thirty miles of main track and sidings as being made, graded, and in all respects complying with the law.' In many cases patents were issued on said certificates for both main line and turnouts, and in some cases did not separate the quantity of land for main line from the quantity of land for sidings.

"XII. The said railway company has expended large sums of money, as aforesaid, in the work of surveying such lands, locating and correcting the same; also in preserving said railway company and enabling it to perform the duties incumbent upon

POOR COPY

it as a common carrier, and has paid large sums of money by way of taxes to the State of Texas.

"XIII. Said lands have been surveyed in all respects as the law requires land to be surveyed for railway companies by virtue of the donation or grants of land into tracts of six hundred and forty acres, where the same could be done, surveying an equal amount for the benefit of the school fund, the field notes of which were recorded and are now in the proper surveyor's office; that maps, plats and sketches thereof were duly made, which, with the field notes and certificates have been duly returned to the general land office of the State of Texas within the time required by law; and have remained on file in the land office ever since; that the same were duly platted upon the maps of the general land office of the State of Texas and suitably marked as the lands of the railway company. The maps of the same are in use of the land office of the State of Texas now. The odd sections recognized said railway company's lands and maps thereof have been furnished to the county surveyors in all the counties where the said lands are situated and are now in their possession and control, showing said lands platted thereon and recognized by the State of Texas, through the officers, as the lands granted to said defendant railway company.

XVI. The following commissioners have issued land certificates for sidings, as well as for main line, towit: Stevens, Crosby, White, Kuechler and Groos.

During the administration of the following governors land certificates were issued for sidings and main line to the railway companies named as follows:

Gov. E. M. Pease:

To the Buffalo Bayou, Brazos & Colorado R. R.

Gov. H. Runnels:

To the Southern Pacific R. R. Co.
To the San Antonio & Mexican R. R. Co.

Gov. Sam Houston:

To the Southern Pacific Railroad Co.
To the Washington Co. R. R. Co.

FLEED THROUGH

GOV. EDWARD CLARK:

To the Washington Co. R. R. Co.
To the B. B. B. & C. R. R. Co.

GOV. J. W. THROCKMORTON:

To the T. & N. O. R. R. Co.
To the Washington Co. R. R. Co.

GOV. E. J. DAVIS:

To the G., H. & S. A. R. R. Co.
To the Galveston, Houston & Henderson R. R. Co.
To the Indianola R. R. Co.
To the Texas Pacific Railroad Co.
To the Houston & Great Northern R. R. Co.
To the Houston & Texas Central Ry. Co.
To the Waco & Northwestern Ry. Co.

GOV. RICHARD COKE:

To the Texas & Pacific Railroad Co
To the Houston & Great Northern R. R. Co.
To the Gulf, Colorado & Santa Fe Ry. Co.
To the Galveston, Harrisburg & San Antonio R. R. Co.

GOV. R. HUBBARD:

To the Texas Pacific R. R. Co.
To the Houston & Great Northern Ry. Co.
To the Gulf, Colorado & Santa Fe Ry. Co.
To the Denison & Southeastern.
To the East Line & Red River R. R.
To the Tyler Tap R. R.
To the Houston, East & West Texas R. R.
To the Georgetown.
To the Dallas & Wichita.
To the Galveston, Harrisburg & San Antonio R. R.
To the Texas Western.

XV. The lands were surveyed and located and certificates issued as shown by the statement in plaintiff's petition, and it

POOR COPY

will not be necessary for either party to procure copies of the field notes or patents.

XVI. The defendant company completed its line of railway from San Antonio to El Paso, and to Rio Grande river in El Paso County, beginning on the ..... day of....., a distance of 623.14 miles, and ending on the ..... day of ....., 18... , for which it never received any certificates for lands. H. B. Andrews, as vice-president of the Galveston, Harrisburg & San Antonio Railway Company, made application to his excellency, O. M. Roberts, Governor of the State of Texas, to appoint a civil engineer to examine and inspect said portion of completed line, which application was refused by Governor Roberts. The said application and the refusal of the governor thereupon are as follows:

"SAN ANTONIO, May 9, 1882.

"*To His Excellency, O. M. Roberts, Governor of Texas:*

"SIR: I would respectfully request your excellency to appoint some competent civil engineer to examine a portion of the completed line of railroad belonging to the Galveston, Harrisburg & San Antonio Railway Company west of the city of San Antonio, beginning at said city and extending to Del Rio, on the Rio Grande, and beginning at El Paso, in El Paso County, and extending to a point within fifty miles of Eagle's Nest, on the Rio Grande, in Pecos County. The said railroad has been built and completed in accordance with the laws of Texas and the charter of said company. Completed road, about four hundred and sixty miles.

"Respectfully,

[Signed] "H. B. ANDREWS,

"Vice-President G., H. & S. A. Ry. Co."

The envelope in which this application is enclosed is endorsed as follows:

"Application for inspection of the G., H. & S. A. Ry., 460 miles west of San Antonio, etc., by H. B. Andrews, Vice-President, May 9, 1882. Received May 22, 1882. Answered and refused May 22, 1882, because the law granting certificates has been repealed.

[Signed] "O. M. ROBERTS, Governor."

XVII. It may be shown by the special charters or by the general acts of the legislature the different roads which received land grants in Texas.

BLEED THROUGH

XVIII. The act legalizing the organization of the Buffalo Bayou, Brazos Valley & Colorado Railroad Company was approved September 4, 1850.

The Southern Pacific Railroad Company was chartered August 16, 1856.

The San Antonio & Mexican Gulf Railway Company was chartered September 5, 1850.

The Washington County Railroad Company was incorporated February 2, 1856.

The Texas & New Orleans Railroad Company was incorporated prior to February 7, 1861.

The Galveston, Houston & Henderson Railroad Company was incorporated February 7, 1853.

The Indianola Railway Company was incorporated January 21, 1858.

The Texas & Pacific Railway Company was not chartered by the State of Texas.

The Houston & Texas Central Railway Company was incorporated September 1, 1856.

The Waco Tap Railroad Company was incorporated in 1866.

By the Act of May 24, 1873, the Waco & Northwestern Railroad Company was merged with the Houston & Texas Central Railway Company.

The Gulf, Colorado & Santa Fe Railroad Company was incorporated May 28, 1873.

The Denison & Southeastern Railroad Company was chartered July 27, 1877.

The East Line & Red River Railroad Company was incorporated by an Act of March 22, 1871.

The Tyler Tap Railroad Company was incorporated by Act of December 1, 1871.

The Houston, East & West Texas Railway Company was incorporated by Act of March 11, 1875.

The Georgetown Railroad Company was chartered May 31, 1878.

The Dallas & Wichita Railroad Company was incorporated December 2, 1871.

The Texas Western Railroad Company was incorported February 16, 1852.

POOR COPY

The Columbus Tap Railroad Company was incorporated February 2, 1860.

The Gulf, Western Texas & Pacific Railroad Company consolidated with the Indianola & San Antonio Railroad Company August 4, 1870.

The Galveston, Brazos-Colorado N. G. Railroad was incorporated February 2, 1875.

XIX. It is further agreed that it may hereafter be shown in evidence the date when Gen. W. P. Hardeman inspected the said railroad company from San Antonio west, and his report in reference thereto may also be introduced in evidence.

XX. The defendant company located the land sued for by virtue of 315 certificates out of 415 issued on the first section of that portion of its road from the Colorado river to the Guadalupe bridge; the 407 certificates of the 433 issued on the second section of its road; the 308 certificates issued on the third section of its road; 91 certificates of the 192 issued on the fourth section of its road; and the 262 certificates issued on the fifth section of its road, said sections of road being, as heretofore referred to, in this agreement.

XXI. That either party may read and have considered in evidence reports of land commissioners of this State showing number of acres of unappropriated public domain; also messages of the governors showing same at stated periods, and up to the present time.

That the railway company long prior to the institution of this suit, executed mortgages for large amounts of money to secure issue of bonds. The mortgages were secured upon the following property, the line of road and its franchises, and on all the lands, locations, surveys, land scrip, and rights to lands that have been or may be hereafter acquired by said company for the construction of its railroad from Harrisburg to San Antonio, by virtue of any general or special acts of the legislature of the State of Texas making donations of lands.

Some of said mortgages are each for the sum of $20,000 per mile of road. One of said mortgages is the mortgage mentioned in defendant's plea, in which George F. Stone is the sole surviving trustee, and it shall not be necessary to further describe the said mortgages. The said mortgages and bonds which they se-

BLEED THR

cured were issued and floated on the money market, and money obtained for the purpose of building and constructing the railroad of defendant company, and were duly recorded in the counties where lands are situated.

The railway company treated and understood, and also the holders of said mortgages so understood that the lands sued for were embraced in and secured by said mortgages, but this point is not conceded by plaintiff.

The State refused to issue and grant any certificates to the defendant company for any part of the road constructed west from San Antonio to El Paso, which is a distance of 623.14 miles of road.

It was shown by the defendant further that the construction of that part of the railroad began west at Columbus, in March, 1873, and was completed to the west Navidad about January 1st, 1874.

The road was opened for business on the following dates: Weimar, Nov. 16, 1873; Schulenberg, Dec. 1, 1873; Flatonia, April 16, 1874; Waelder, July 1, 1873; Luling, Sept. 1, 1874; Kingsbury, July 23, 1875; Seguin, August 10, 1875; Guadalupe river, August 10, 1876.

Construction west of San Antonio began in May, 1881. The first grading at Rio Grande river near El Paso, was done on March 28, 1881. The construction of the road was finished from El Paso eastward December 27, 1882. The road was opened for business west from San Antonio and El Paso at La Coste, 25 miles, October 1, 1881; at Hondo, 50 miles, 1881; at Sbinal, 71 miles, October 24, 1891; at Uvalde, 93 miles, November 21, 1881; at Eagle Pass Junction, 132 miles, March 6, 1882; at Del Rio, 170 miles, June 23, 1882. Construction west from San Antonio and east from El Paso met in January, 1883.

Defendant introduced the following certificates from the office of the secretary of state, to-wit:

"SAN ANTONIO, June 13, 1881.

"*To His Excellency, O. M. Roberts, Governor of Texas:*

"SIR: I have the honor to inform your excellency that the Galveston, Harrisburg & San Antonio Railway Company have completed an extension of their main line of railway from the

UGH POOR COPY

terminus in the city of San Antonio westward, a distance of over ten miles. The same has been built and completed in full compliance with the laws of Texas governing the construction of railroads and the provisions of the charter of said company, and is a portion of their line being built to connect with a railroad being constructed from the Pacific coast. I would therefore respectfully request the appointment of some competant engineer to inspect and report upon said completed portion of this extension in order that this company may obtain the number of certificates for land to which it is entitled under the laws of Texas.

"Very Respectfully,

[Signed] "H. B. ANDREWS, Vice-President."

"SAN ANTONIO, May 9, 1882.

"*To His Excellency, O. M. Roberts, Governor of Texas:*

"SIR: I would respectfully request your excellency to appoint some competent civil engineer to examine a portion of the completed line of railroad belonging to the Galveston, Harrisburg & San Antonio Railway west of the city of San Antonio, beginning at said city and extending to Del Rio, on the Rio Grande, and beginning at El Paso, in El Paso County, and extending to a point within fifty miles of Eagle's Nest on the Rio Grande in Pecos County. The said railroad has been built and completed in accordance with the laws of Texas and the charter of said company; completed road about 460 miles.

"Respectfully,

[Signed] "H. B. ANDREWS,

"Vice-Pres. G., H. & S. A. R'y. Co."

"Endorsed: Application for inspection of the G., H. & S. A. R'y., 460 miles west of San Antonio, etc., by H. B. Andrews, Vice-Pres., May 9, 1882. Answered and refused May 22, 1882, because the law granting certificates has been repealed.

[Signed] "O. M. ROBERTS, Governor."

"*His Excellency, O. M. Roberts, Governor of Texas:*

"SIR: In obedience to your commission dated Austin, June 25, 1881, authorizing me to inspect ten miles or more of the Galveston, Harrisburg & San Antonio Railway Company, I

BLEED THR

have the honor to report that on the 27th and 28th days of June I inspected and measured said road and find:

"1st. The road is substantially built.

"2nd. That it is fully equipped for the transportation of both passengers and freight, having 32 engines, 4 sleepers, 2 parlor, 6 mail, 186 box, 129 stock, 302 flat cars.

"3rd. That it is operated by steam and constructed of steel rails weighing fifty (50) pounds to the lineal yard.

"4th. The length of road inspected commencing at the passenger depot in the city of San Antonio, ending at the north end of the bridge over the Leona, is eleven (11) miles; drove railroad spike in the end of first sill on the north side of the river, terminal point.

"5th. There are fourteen bridges well built; shortest curve, 4°; maximum grade forty-two feet to the mile.

"6th. The road was completed to San Antonio in February, 1877; the excursion train (which I think was the first passenger train) was on the 19th day of February, 1877.

"7th. Am informed by Major Canno, chief engineer of the road, that the survey west of San Antonio commenced June 1st, 1880, and commenced work January 4th, 1881, west from San Antonio.

"8th. So far as the manner in which the road is built is concerned, it has been constructed in accordance with its charter and the general laws of the State. As to whether it has been built in time, the information contained in this report will enable the attorney-general to determine.

"The road is completed to Medina river, about eighteen miles. They only wanted eleven miles inspected.

"San Antonio, June 29th, 1881.

[Signed] "Wm. P. Hardeman, Special Engineer."

"Sworn to and subscribed before me on this the 30th day of June, A. D. 1881.

[Signed] "John Rosenheimer,
"Notary Public Bexar County, Texas."

"Endorsed: G., H. & San Antonio R. Company Inspection report of W. P. Hardeman of ten miles west of San Antonio, June 30, 1881."

OUGH POOR COPY

Defendant introduced in evidence deposition of W. P. Hardeman, and showed by him that he inspected the road west from San Antonio under appointment of Governor Roberts first, and afterwards under contract with Mr. Pierce, who was then the president of the railway company.

The first inspection was made on June 27 and 28, 1881, for eleven miles; balance made not long after the repeal of the law.

The work west of San Antonio began June 4, 1881. From Leona river to a short distance west of Del Rio the road was completed before April 22, 1882, a distance of 183.6 miles. Inspected the road under contract with Pierce from Rio Grande, above El Paso 268 miles, to a point near Marathon, pointed out by chief engineer, Mr. Linburg, as the point to which the road was completed April 22, 1882.

Inspected all that was completed to April 22, 1882; don't know the exact date, but what he did inspect he found complete and in running order, and in other respects according to law.

Defendant proved the following facts by deposition of W. L. McGaughey, commissioner of the general land office:

"The unappropriated public domain was as follows at the dates given:

August 31, 1872..... 88,842,704½
August 31, 1873.....84,565,367.91
January 24, 1874.....83,783,750.91
August 3, 1874.....79,227,793.1

"At the following round dates the unappropriated public domain, according to the then commissioner of the general land office, had ceased to exist, and the State's land liabilities exceeded its assets, to-wit:

August 31, 1882, deficiency....6,136,615 acres
August 31, 1884, deficiency....6,745,723 acres

"At the date of his report, August 31, 1892, excess of public domain over liabilities was estimated at 745,666 acres. Change from liability in 1883 to excess in 1892 was caused by the non-return of certificates within the constitutional limitation of five

BLEED THR

years from date of issuance, or to their location on reserved lands, rendered them void unless floated as provided by law.

"An approximate estimate of the unappropriated public domain reserved from location by certificate and sale made January 12, 1893, makes the number of acres of such land 4,393,835.

"Reservation was first made by the act of July 14, 1879, which took effect October 9, 1879. The number of acres of the unappropriated public domain was at that time approximately 31,025,298, as per report of the commissioner of this office.

"It is agreed that in making out a transcript in this case for appeal, the clerk may leave out the exhibits to the petition of plaintiff and refer to the description of the lands in the judgment, which are accurately described, and having been taken from the petition, are identical therewith, this agreement being made to save the expense, as well as to lessen the size of the record.

"It is agreed by and between the parties hereto that the foregoing contain a true statement of facts, embracing all the material testimony introduced and offered in evidence on the trial hereof."

The plaintiff in error appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, and that court certified to the Supreme Court of the State the main questions upon which the case depended.

The certified questions and the opinion of the Supreme Court will be here inserted together to avoid repetition. They read as follows: "The following questions have been certified for our determination: 'The State of Texas instituted suit against the appellant to cancel certain land certificates and patents issued by the State to appellant for land amounting to 879,078 $\frac{1}{2}$ acres. It was alleged and proved that the certificates and patents were issued to the Galveston, Harrisburg & San Antonio Railway Company for a portion of its railroad constructed between the Colorado river and Guadalupe river, between the time of the adoption of the Constitution of 1869 and the passage of the Act of August 16th, 1876 (Arts. 4267 to 4277, Rev. Stats). On July 27th, 1870, by special act of the legislature, appellant was chartered and recognized as the successor of the Buffalo Bayou, Brazos & Colorado Railroad Company. After the passage of

UGH POOR COPY

the Act of August 16, 1876, and before its repeal in 1882, appellant constructed about 163 miles of railroad from San Antonio westward towards El Paso, for which the State refused to issue land certificates, the governor refusing the application for inspection on May 22, 1882, on the ground that the law granting certificates had been repealed.'

"Question 1. Did section 6, article 10, of the Constitution of 1869, repeal all laws giving railroad companies the right to earn lands from the State by the construction of railroads; and if so, would this repeal apply as well to the right to earn lands given through charters as through general laws?

"Question 2. If the above be answered in the negative, did appellant succeed to the rights of the Buffalo Bayou, Brazos & Colorado Railway Company by virtue of the special act of 1870, said Buffalo Bayou, Brazos & Colorado Railway Company being restricted by special act of February 11th, 1854, to run its line to Austin?

"Question 3. If the laws as to land grants to railroads passed prior to 1869 were repealed by the Constitution of that year, can appellant interpose and maintain in this suit the equitable defense that if the certificates issued for that portion of the road between the Colorado and Guadalupe rivers from 1870 to 1876 were illegally obtained, that the State is in no position to ask the relief sought, by reason of the fact that appellant has earned the certificates for said 163 miles of road?

"Question 4. If the last question be affirmatively answered, would the fact that at the time the land for 163 miles west of San Antonio was earned by appellant the public lands were exhausted, affect the equities of the case?"

1. Our opinion upon the second question certified renders, we think, a decision of the first unnecessary. We therefore pass to a discussion of the second.

2. The Buffalo Bayou, Brazos & Colorado River Railroad Company was incorporated by a special act of the legislature, to which there were several amendments. Its name was changed to that of the Galveston, Harrisburg & San Antonio Railway Company, also by special act. The statement accompanying the question does not expressly advise us whether these acts were pleaded and proved upon the trial or not. However, the

BLEED

briefs of the parties which were filed in the Court of Civil Appeals, and which are sent up with the certificate, indicate that they were. Since it is impossible for us to properly decide the questions submitted without having before us the legislation upon which the company bases its claim to the lands in controversy, we conclude that the special acts of the legislature affecting that claim were properly brought to the knowledge of the trial court, and that the questions have been certified upon that assumption. We shall, therefore, discuss the points presented, assuming that we are to look to all the legislation upon which the company's claim depends.

The act incorporating the Buffalo Bayou, Brazos & Colorado Railroad Company was approved February 11, 1850. By that act the company was authorized to construct and maintain a railroad "commencing at any suitable point on Buffalo Bayou between Lynchburg and Houston in the county of Harris, and thence running by such course and to such point at or near the Brazos River between the towns of Richmond and Washington, inclusive, as said company shall deem most suitable, with the privilege of making, owning and maintaining such branches of said railway as they may deem expedient" (Laws 1849-50, p. 194). No privilege of acquiring lands was granted by this act, but another special law was passed by the fourth legislature, and was approved January 27, 1853, which authorized the commissioner of the general land office to issue to the company certificates to the amount of eight sections of land for each mile of road that should be completed and put in good running order, under certain restrictions not necessary to mention (Special Laws 1853, p. 3). On the 30th day of January, 1854, a general statute was approved by the governor which granted to all railway companies which had theretofore constructed, or which should thereafter construct twenty-five miles of railroad, certificates to the amount of sixteen sections of land for each mile of road (Laws 1853-4, p. 11). This act also contained conditions and restrictions which we need not detail in this connection.

The same legislature passed two special acts, one amendatory of the charter of the Buffalo Bayou, Brazos & Colorado Railroad Company and the other supplemental thereto, the first of which provided "that the 'Buffalo Bayou, Brazos & Colorado

HROUGH POOR COPY

Railroad Company' shall be entitled to all the rights, privileges and benefits accruing from any general law or laws that have or may hereafter be passed by this State to encourage the constructing of railroads in the same manner and to the same extent as if the gauge of said road was the same now fixed or which may be hereafter fixed upon by this State."

By the second it was provided "that if the Buffalo Bayou, Brazos & Colorado Railroad Company shall avail themselves of the act to which this is a supplement, or accept any donation of land from the State, they shall not be entitled to receive any such donation from the State under the provisions of this law, or any law that has heretofore been passed for their benefit, for any portion of their road which shall not be completed and ready for use within ten years from and after the passage of this act; provided, that said company shall restrict themselves to the following route, viz.: To an extension of their existing road to Austin, in the county of Travis, crossing the Brazos River at any point between the towns of Richmond, in Fort Bend County, and Hidalgo Falls, in Washington County, and with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific Ocean; provided, such connections be made between the ninety-sixth and ninety-eighth parellels of longitude; and provided further, that said company shall have no right to build branches from their main road."

Both these acts were approved February 4, 1854. Whether or not the company ever accepted the benefits of these acts, the meagre statement of the Court of Civil Appeals does not advise us; but since the act of July 27, 1870, which changed the name of the company to its present name, under certain conditions, authorizes an issue of certificates to the amount of sixteen sections per mile for such portions of the road as had been constructed before the war, but not within the time provided by the act of January 30, 1854, we infer that it did so accept.

During the period of the civil war two laws were passed which had the effect to relieve the existing railroad companies from the limitations as to time embraced in the act of 1854 until two years after the close of the war; and on the 13th day of November, 1866, an act was approved which contained the following section: "Be it enacted by the legislature of the State of

BLEED THROUGH

Texas: That the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act."

The special act of July 27, 1870, recognized the present company as the purchaser of the franchises, rights and property of the original company, which had been "sold out," and as its successor, and changed the name to that of the Galveston, Harrisburg & San Antonio Railway Company, and amended its charter in important particulars. We quote so much of that law as is deemed necessary for the purposes of this opinion:

"WHEREAS, On the seventh July, 1868, 'the roadbed, track, franchises, and chartered rights and privileges' of the Buffalo Bayou, Brazos & Colorado Railroad Company were sold on executions issued on judgments against said company, and on the 24th January, 1870, the railroad of said company from Harrisburg to Alleytown and its franchises, rights and other property appertaining thereto were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record; and

"WHEREAS, the act of December 19, 1857, 'supplementary to and amendatory of an act to regulate railroad companies,' provides that the purchasers at such sales and their associates 'shall be entitled to have and exercise all the powers, privileges and franchises granted to the company sold out,' by its charter or by virtue of the general laws of this State, and 'shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof;' and

"WHEREAS, the purchasers at said sales and their associates have formed a new company under said old name, and have expended large sums of money in the reconstruction of said railroad, in the purchase and completion of the Columbus Tap railroad and the bridge of the Brazos Iron Bridge Company over the Brazos river at Richmond; and whereas, said new company desires to be distinguished by name from said 'sold out' company, to consolidate its property and to extend its line of railroad; therefore,

GH POOR COPY

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the new company heretofore known as the Buffalo Bayou, Brazos and Colorado Railroad Company, referred to in the preamble of this act, shall be hereafter known by the corporate name of 'the Galveston, Harrisburg & San Antonio Railway Company,' and may alter its seal to conform to its name; provided, that said new company shall be liable to the State of Texas for the debt of said 'sold out' company for loans made to the latter company from the special school fund, in the same manner and to the same extent that the said 'sold out' company was liable; and that said change of name shall in no respect impair or affect said liability, or the existing lien or mortgage of the State upon the railroad of said company as security for said loans."

"But the Constitution which was in force at the time this last named act was passed contained this provision: 'The legislature shall not hereafter grant land to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in limits not exceeding one hundred and sixty acres.' (Cons. 1869, art. 10, sec. 6.)

"In so far as the determination of the question under consideration is concerned we think it may be conceded for the purposes of the argument that the company acquired a right to sixteen sections of land per mile of constructed railroad under the general law of 1854 and the special acts above recited amendatory of its charter, and that this right was preserved by the general law of 1866. It may also be conceded for the same purpose that section 6 of article 10 of the Constitution of 1869 was intended to have purely a prospective effect and did not operate to repeal either the law of 1854 or that of 1866 as to railroad companies then in existence, for if it should be held that the privileges extended by the previous laws to existing companies was not affected by the section the question arises whether after that Constitution took effect an act of the legislature which authorized the company to change its former route and to construct a different line of road would carry with it the right to acquire land by the construction of the new line. It must be borne in mind that when the Constitution of 1869 was adopted no general law was in force for the incorporation of railroad companies. The

BLEED THROUGH

charters of all the other existing companies had been granted by special acts of the legislature; all of which defined with some degree of certainty the line of road to be constructed. We construe the general law of January 30, 1854, as applying only to companies then chartered. (See Quinlan vs. H. & T. C. R'y Co., this day decided.) It was clear that it was intended to grant land to the companies for the construction of railroads which their charters authorized them to build. It may be conceded that so long as the general law which granted privileges of acquiring lands remained in force, and so long as no constitutional inhibition stood in the way, legislative authority to a company to change the line to be constructed should be construed to carry with it the privilege of earning lands for the construction of the new line. At all events, it is clear, we think, that the act of February 4, 1854, supplemental to the act of the same date, which extended the privileges of the general law of January 30, 1854, to the company, restricted those privileges to the line to Austin and to the extension of that line. The proviso "that said company shall restrict themselves to the following route, viz., to an extension of their existing line to Austin," admits of no other construction. The purpose and effect of the first section of the act of November 13, 1866, was merely to give to the companies to which it applied ten years from the date of the act within which to comply with the terms of their charters and the general laws with respect to land grants. Let us admit then for the purposes of the argument that in 1870, when the name of the company was changed and when it was granted authority to alter the line to be constructed, that it had the right to acquire lands by the construction of its line as fixed by the supplemental act of 1854, we are still confronted with the question, did the legislature have the power, had it so intended, so to authorize a change of its line and at the same time to carry with the change of line the privilege of earning lands for the construction of a different road? Section 6 of article 10 of the Constitution then in force prohibited the legislature from granting lands thereafter for the construction of a railroad. That it could authorize a change of route there can be no question; but there is a grave question whether or not it could, under the Constitution, then existing, transfer a privilege

H POOR COPY

of acquiring lands by the construction of a well defined line of railroads from a route so defined to another not contained in the previous grant. The company before the passage of the act of 1870 had no right to acquire lands by the building of a railroad to San Antonio. To complete that right a new grant was requisite, but at that time the legislature was prohibited in the broadest terms from making any grant whatever. It matters not that the transaction may be looked upon as being somewhat in the nature of an exchange, and that the building of the new line may have involved a grant of no more, or even less land, than may have been acquired by the construction of the old line. It involved a grant of land as to the new line, and that the legislature had no right to make. Let us state the proposition in another form: If it were the right of the company under the existing laws to acquire lands by doing a specific thing, the legislature, having no power under the Constitution to make any grant of lands, could not confer upon it the right to earn lands by doing another a different thing.

"So far we have discussed the question as if in passing the act of 1870 the legislature had intended to transfer the right of the company as to the lands to be acquired from the old to the new line; but we find nothing in the act which manifests such an intention. On the contrary, the twelfth section of the act, as above quoted, indicates that it was not the purpose in any manner to extend the existing rights of the company with reference to the acquisition of lands from the State.

"It is to be noted that the third section of the act of 1870 not only authorized the company to change its route so as to run to San Antonio instead of Austin, but in addition thereto reserved to it the right to build upon the route formerly designated to the sold out company. It is evident, therefore, that to concede to the company the right to earn lands by the construction of the new line involves a new and additional grant—a grant which the legislature, under the Constitution of 1869, could have made neither expressly nor by implication.

"This question was before this court at a former term, in a suit between the same parties, and the point was there resolved as we resolve it now (G. H. & S. A. Ry. Co. vs. State, 81 Texas, 572); but it is urgently insisted that the question was not in-

BLEED

volved in that case. Without conceding the correctness of this contention, in view of the magnitude of the interests involved in the present case, we have gone over the question anew, and without reposing upon the former decision, have arrived at the same result. We are therefore of the opinion that the Galveston, Harrisburg & San Antonio Railway Company did not, by virtue of the act of July 27th, 1870, acquire the right to earn lands by the construction of its line to San Antonio.

"3. Referring to the third question certified by the Court of Civil Appeals, we are of the opinion that it is no defense to an action of the State for the recovery of the lands involved in this suit, that the company may have been entitled to certificates for the 163 miles of additional road constructed under the law of 1876. It acquired no title, either legal or equitable, to the lands in controversy by causing them to be surveyed and patented under the certificates granted for the San Antonio extension. To make its right to lands earned by the additional construction effectual for any purpose, it must have procured its certificates and located them upon some portion of the public domain not reserved from the location of such certificates. Our complicated and ever varying laws in regard to the appropriation of the public domain have probably given rise to more questions affecting the location of lands than have ever arisen in any other jurisdiction, and yet we know of no case in this court in which it has ever been ruled that the claimant of land against the State, under a location made by virtue of a void certificate, has any equity in the premises by reason of being the possessor of another valid certificate.

"4. The third question not having been answered in the affirmative, the fourth does not arise.

"R. R. GAINES, Chief Justice."

The Court of Civil Appeals thereafter affirmed the judgment of the court below. (Record, pp. 126 to 130.)

The plaintiff in error sought a writ of error from the Supreme Court of the State to the Court of Civil Appeals, which was denied. (Record, p. 151.) Writ of error was subsequently granted by Chief Justice James for the Court of Civil Appeals

D THROUGH POOR COPY

for the Fourth Supreme Judicial District of Texas. (Record, p. 163.)

The plaintiff in error presents in this court twelve assignments of error, which are as follows:

"First.—The said Court of Civil Appeals erred in overruling and holding not well taken appellant's first and second assignments of error, each of which complained, in effect, of the action and ruling of the District Court of Brewster County in refusing appellant's application to remove this cause into the Circuit Court of the United States, and in proceeding with this cause after the presentation of the petition and bond for such removal.

"Second.—The said Court of Civil Appeals erred in overruling and holding not well taken appellant's fifth assignment of error, and in deciding that the special acts of the legislature of the State of Texas, approved February 11th, 1850; September 4th, 1850; January 29th, 1853; February 4th, 1854, and July 27th, 1870, chartering and amending the charter of plaintiff in error railway company, and the general acts of the legislature of the State of Texas, approved January 30th, 1854; January 11th, 1862, and November 13th, 1866, and the acceptance of said laws and the construction by plaintiff in error railway company at large expense of an important part of its line of railway prior to the adoption of the Constitution of Texas in 1869, and the completion of its entire line subsequently and in due time did not constitute a valid contract between the State of Texas and the said railway company, entitling said railway company and creating in it a vested right to lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in holding and deciding in effect that said contract could be and was impaired, and the right of said railway company to said land was divested by the Constitution of Texas, adopted in 1869, contrary to and in violation of the Constitution of the United States, and especially article 1, section 10 thereof, and section 1, article XIV of the amendments thereof.

"Third.—The said Court of Civil Appeals erred in not deciding that the special acts of the legislature of the State of Texas, approved February 11th, 1850; September 4th, 1850; January

BLEED THRO

29th, 1853; February 4th, 1854, and July 27th, 1870, chartering and amending the charter of plaintiff in error railway company, and the general acts of the legislature of the State of Texas, approved January, 30th, 1854; January 11th, 1862, and November 13th, 1866, and the acceptance of said laws, and the construction by plaintiff in error railway company at large expense of an important part of its line of railway prior to the adoption of the Constitution of Texas in 1869, and the completion of its entire line subsequently and in due time constituted a valid contract between the State of Texas and said railway company entitling said railway company and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in not holding and deciding in effect that said contract could not be and was not impaired, and the right of said railway company to said land was not divested by the Constitution of Texas, adopted in 1869, and that in so far as said State Constitution attempted to impair such contract and divest such right, the same was and is contrary to and in violation of the Constitution of the United States, and especially article 1, section X thereof, and section 1, article XIV of the amendments thereof, and therefore void.

"Fourth.—The said Court of Civil Appeals erred in overruling and holding not well taken appellant's ninth assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of Section X, thereof, and section 1 of article XIV, of the amend-

GH POOR COPY

ments thereof, and could not, therefore, impair said company's contract right or divest it of said lands.

"Fifth.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's tenth assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by such act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impared or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section 10 thereof, and section 1 of article XIV of the amendments thereof, and could not therefore impair said company's contract right or divest it of said lands.

"Sixth.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's eleventh assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right in and to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such land to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section X thereof, and section 1 of article XIV of the amendments thereof, and could not,

therefore, impair said company's contract right or divest it of said lands.

"Seventh.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's thirteenth assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section X thereof, and section 1 of article XIV of the amendments thereof, and could not, therefore, impair said company's contract right or divest it of said lands.

"Eighth.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's fourteenth assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section X thereof, and section 1 of article XIV of the amendments

thereof, and could not, therefore, impair said company's contract right or divest it of said lands.

"Ninth.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's fifteenth assignment of error, and deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1, section X, and section 1 of article XIV of the amendments thereof, and could not, therefore, impair such company's contract right or divest it of said lands.

"Tenth.—Said Court of Civil Appeals erred in overruling and holding not well taken appellant's seventeenth assignment of error and in deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas approved August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas approved April 22, 1882, and in not deciding that the last mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section X thereof, and section 1 of article XIV of the amend-

BLEED THR

ments thereof, and could not, therefore, impair said company's contract right or divest it of said lands.

"Eleventh.—Said Court of Civil Appeals erred in holding and deciding that plaintiff in error railway company had not, under the general act of the legislature of the State of Texas, approved August 16, 1876, by constructing its road between San Antonio and El Paso, a distance of 623 miles, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to and was entitled to hold under the grant thus made the lands involved in this suit, which contract and vested right could not be impaired or divested by the general act of the legislature of the State of Texas, approved April 22, 1882, and in not deciding that the last-mentioned act, which attempted to repeal the laws granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially article 1 of section 10 thereof, and section 1 of article XIV of the amendments thereof, and could not, therefore, impair said company's contract right or divest it of said lands.

"Twelfth.—Said Court of Civil Appeals erred in affirming the judgment of the District Court in and for Brewster County, whereby the State of Texas had and recovered the said lands from plaintiffs in error, and in not reversing the said judgment.

Wherefore, the Galveston, Harrisburg & San Antonio Railway Company, E. P. Hill and W. N. Shaw, plaintiffs in error, pray that the judgment of the said Court of Civil Appeals be reversed and said cause be remanded, and for such further proceedings as law and justice may require."

FIRST COUNTER-PROPOSITION UNDER FIRST ASSIGNMENT OF ERROR.

The Court of Civil Appeals did not err in overruling the first and second assignments of error, which related to the refusal of the trial court to remove the cause from the State court to the Federal Court. Because the statement of plaintiff's cause of action discloses no Federal question.

Statement.—The statement of plaintiff's cause of action, as far

OUGH POOR COPY

as the point involved is concerned, is fairly included in the following paragraph:

"Plaintiff further represents and shows to the court that the certificates referred to in said exhibits were issued to the defendant company for the construction of its road from the town of Columbus to the Guadalupe bridge, as heretofore shown, and that every portion of said road was constructed and completed between July 27, 1870, and October 27, 1876.

"That at no time during said period was there any law in existence in this State authorizing the issuance of land certificates to the defendant company for main track or sidings, and especially does the plaintiff aver and represent that—no time during said period was there any law in existence authorizing the issuance of certificates to said company for the construction of its line of road between Columbus and the Guadalupe bridge. (Subdiv. 10, Record, p. 35.)

Based upon the allegations above mentioned, the conclusion was stated on the same page as the record that the commissioner of the land office acted in excess of his authority in issuing and delivering to the defendant company the land certificates and in permitting them to be located on the land in question, and in accepting the field notes, which were returned and filed in the land office.

Authorities:

Tennessee Bank vs. Bank, 152 U. S., 455-64.
Chappell vs. Waterworks, 155 U. S., 102.
P. T. C. Co. vs. Alabama, 155 U. S., 487.
East Lake Co. vs. Brown, 155 U. S., 488.

FIRST COUNTER-PROPOSITION UNDER SECOND ASSIGNMENT OF ERROR.

The court did not err in holding that the several acts of the legislature passed prior to the adoption of the Constitution of 1869 constituted a contract between the Galveston, Harrisburg & San Antonio Railway Company and the State of Texas, because the Galveston, Harrisburg & San Antonio Railway Company did not exist prior to the adoption of the State Constitution of 1870.

BLEED TI

Statement: The act chartering the appellant company was passed on the 27th of July, 1870. So much of it as relates to the question before the court reads as follows:

"Whereas, on the seventh July, 1868, the 'roadbed, track, franchise, and chartered rights and privileges' of the Buffalo Bayou, Brazos and Colorado Railway Company were sold on executions issued on judgments against said company; and on the twenty-fourth January, 1870, the railroad of said company from Harrisburg to Alleytown, and its franchise, rights, and other property appertaining thereto, were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record; and

"Whereas, the act of December 19, 1857, 'supplemantary to and amendatory of an act to regulate railroad companies,' provides that the purchasers at such sales, and their associates 'shall be entitled to have and exercise all the powers, privileges, and franchises granted to' the company sold out 'by its charter, or by virtue of the general laws of this State,' and 'shall be deemed and taken to be the true owners of said charter, and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof,' and

"Whereas, the purchasers at said sales, and their associates, have formed a new company under said old name, and have expended large sums of money in the reconstruction of said railroad, in the purchase and completion of the Columbus Tap Railroad, and the bridge of the Brazos Iron Company over the Brazos river at Richmond; and

"Whereas, said new company desires to be distinguished by name from said 'sold out' company, to consolidate its property, and to extend said line of railroad; therefore,

"Section 1. Be it enacted by the Legislature of the State of Texas: That the new company heretofore known as the Buffalo Bayou, Brazos and Colorado Railway Company, referred to in the preamble of this act, shall be hereafter known by the corporate name of 'The Galveston, Harrisburg and San Antonio Railway Company,' and may alter its seal to conform to its name; provided, that said new company shall be liable to the State of Texas for the debt of said 'sold out' company, for loans made to the latter company from the special school fund, in the same manner and to same extent as said 'sold out' company was liable; and that said change of name shall in no respect impair or affect said liability, or the existing lien or mortgage of the State upon the railroad of said company as security for said loans. Also, provided, that said change of name shall in no respect impair or affect any of the obligations of said new company to other parties, or the obligations of other parties to said new company; all of which may be enforced by or against said new company under said new name.

"Sec. 2. That said railroad company may avoid the sale of its railroad for its indebtedness to the State for loans from the special school fund, and for the non-payment of principal and interest, by the payment into the treasury of the State, on the first day of November, A. D. 1870, of six months'

ROUGH POOR COPY

interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment in addition, on said first day of November, of one per cent. upon said aggregate amount, to be applied towards the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and one per cent on account of said sinking fund semi-annually thereafter, to-wit: on the first day of May and November, in each year; provided, that in case of failure to comply with any payment required under this section, the governor shall sell the said road under the regulations provided in the law of August 13, 1856.

"Sec. 3. That said new company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado County, to San Antonio, in the county of Bexar, within four years from the passage of this act, and thence to a terminus on the Rio Grande, by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfels, in Comal County, within four years from the passage of this act; or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of the latitude of the city of Austin and the Colorado river, instead of building its own line beyond the point of such connection; and may build to or connect with any line of railroad that may be constructed, or under construction, and designed to form part of any railroad line to the Pacific, south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct also, any part of the line up the Colorado valley, formerly designated by said 'sold out' company as its route under the provisions of the eleventh section of the act of December 19, 1857; provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited.

"Sec. 4. That said new company may consolidate with its existing railroad the bridge built by the Brazos Iron Bridge Company over the Brazos river at Richmond, and the five miles of railroad, more or less, including side tracks, from the town of Alleytown to the town of Columbus, built under the charter granted in the year 1860 to the Columbus Tap Railroad Company, including the bridge over the Colorado river at Columbus, together with all the franchises, rights, fixtures, and appurtenances of, or upon any of the same, and may construct and maintain telegraphs along its lines.

"Sec. 5. That said new company may issue its bonds, under seal or otherwise, and secure the same by mortgage or mortgages upon its said consolidated line of railroad, or any part of the same, and any such mortgage may be so expressed as to include and cover, as said company shall construct the same, the lines of railroad it may construct in extension of its existing line, together with all the franchises and rights, bridges, depots, fixtures, equipments, machinery, and the appurtenances and property of said railroad, and of said company, of every kind, or any part thereof, whether constructed or acquired before or after the execution of said mortgage, and

BLEED THROUGH

with provision for a sinking fund sufficient for its extinguishment at the maturity of the principal of the bonds secured thereby. That the amount of bonds that may, at any time, be outstanding under any such mortgage, shall not exceed twenty thousand dollars for each mile of single main track, with the necessary turnouts, included in such mortgage, and completed and in running order. That all the bonds secured by such mortgage shall be on an equality in respect to the benefits of the same, shall be of the same form and tenor, except that they may be of different dates, and for different amounts, and shall mature at the same time, in not more than fifty years from the date of those of said bonds which shall be first issued. That said bonds shall bear interest at such rates, not exceeding eight per cent. per annum, payable semi-annually; both principal and interest shall be payable in gold, or other lawful currency of the United States, at the places named in the bonds and coupons, and, with said mortgage or mortgages, may be otherwise in such form, and contain such stipulations not inconsistent with the provisions of this act, as the directors shall think proper to embody therein.

"Sec. 6. That said new company may issue such other bonds, and secure them by other mortgage or mortgages, on its railroad, franchises and property, or any part of the same, subsequent and subject to the mortgages hereinbefore provided for, as the interest of said company may require. And any bonds lawfully issued by said new company may be disposed of by the directors on such terms as they shall think proper.

"Sec. 7.

"Sec. 8. That in case it shall be made to appear to the governor that there has not been issued upon said railroad the full quantity of sixteen sections of land scrip for every mile of the same that was constructed and put in running order prior to the war of the late rebellion, in accordance with the provisions of the charter and of the general laws of the State, in force at the time regulating railroads, there shall be issued to said new company said scrip to the amount of any such deficiency, notwithstanding said railroad may not have been constructed and completed at the rate of twenty-five miles each year after the construction of the first twenty-five miles, as provided in the act of January 30th, 1854.

"Sec. 9. That meetings of said new company and of the directors may, when desirable, be held at an office of said company in Boston, Massachusetts, as well as at the 'principal office' of the company in Texas; provided, that the votes passed at meetings in Boston shall be within thirty days therefrom, spread upon the records, which shall be kept at the 'principal office' in Texas. That a majority of the directors and the president and treasurer shall not be required to reside in this State so long as the vice-president and assistant treasurer reside therein; and directors may vote by proxy under such regulations as the by-laws may prescribe.

"Sec. 10. That said new company may make a terminus of said railroad at the city of Houston, and for that purpose may acquire, by agreement with the owners, any part of the Houston, Tap & Brazoria Railroad; and said company may make a terminus at the city of Galveston, arranging with any

POOR COPY

railroad running to Galveston for a third rail thereon, or other connection therewith, or extend its own line thereto, if preferable.

"Sec. 11. The said new company shall be entitled to the same or similar rights and relief, except State aid in bonds, or indorsement of, or guaranty of interest on bonds, granted to or provided for any other railroad company by the legislature, and upon the same or similar terms and conditions, so far as such rights or relief are, in their character, applicable to said new company or its line, or lines, of railroad.

"Sec. 12. That nothing in this act shall be so construed as to deprive any party interested, of the right to disprove any assumed fact stated in the preamble, provided, that nothing in this act contained shall be construed as reviving or renewing any land grant to said company for road hereafter to be completed, which it does not possess by existing law.

"Sec. 13. That this act shall take effect from its passage."

Authorities:

Argument: It is clear that the Galveston, Harrisburg & San Antonio Railway Company did not exist until the 27th day of July, 1870. It was therefore impossible for it to have made any contract with the State before it had any legal existence. Its power to contract dated from its creation. These powers are measured by the act in question, which was its charter.

But it is insisted, however, that it is but a continuation of the Buffalo Bayou, Brazos & Colorado Railroad Company under a new name. The preamble to the charter of the plaintiff in error destroys that contention. It recites that, "Whereas, On the seventh July, 1868, 'the road-bed, track, franchise, and chartered rights and privileges,' of the Buffalo Bayou, Brazos and Colorado Railway Company were sold on executions issued on judgments against said company; and that on the twenty-fourth January, 1870, the railroad of said company from Harrisburg to Alleytown, and its franchise, rights, and other property appertaining thereto, were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record," etc. It further recites that the law authorized the purchasers at such sales, and their associates, to exercise all of the powers, privileges and franchises granted to the "sold out" company, and

BLEED THROUGH

that they shall be taken to be the true owners of such charter and corporators under the same, and vested with all the powers, privileges and benefits thereof. It then follows that, "Whereas, The purchasers at said sales, and their associates, *have formed a new company* under such old name, and have expended large sums of money in the construction of said railroad, in the purchase and completion of the Columbus Tap Railroad, and the bridge of the Brazos Iron Bridge Company over the Brazos River at Richmond;" and then recites that "Whereas, Said new company desires to be distinguished by name from said 'sold out' company, to consolidate its property, and to extend said line of railroad; Therefore, Be it enacted * * * that the *new* company heretofore known as the Buffalo Bayou, Brazos & Colorado Railway Company, referred to in the preamble of this act, shall be hereafter known by the name of the Galveston, Harrisburg & San Antonio Railway Company."

It will be noted that it was not the old company known as the Buffalo Bayou, Brazos & Colorado Railway Company that had its name changed by this act. It was a new company of that name, which the purchasers of the property of the "sold out" company had formed. Unless that is true, the third section of the preamble has no meaning. It says: "Whereas, The purchasers at said sales and their associates have formed A NEW COMPANY UNDER SAID OLD NAME:" then follows: "Said new company desires to be distinguished by name from said sold out company." Therefore the act was passed. It seems idle for the plaintiff in error now to contend that the new company thus formed, incorporated as the Galveston, Harrisburg & San Antonio Railway Company, can be confused with the old Buffalo Bayou, Brazos & Colorado Railway Company, since the very purpose of the charter in question was to distinguish this company from the old company. The contention is without merit.

Moreover, sections 3, 4, 5, 6, 9, 10 and 11 of the charter distinctly refer to the Galveston, Harrisburg & San Antonio Railway Company as the "new company." And almost as frequently refer to the old company as the "sold out" company. It seems, therefore, incredible that any one should contend that the old company sold out, and the new company, viz., the Galveston, Harrisburg & San Antonio Railway Company, should

GH POOR COPY

be considered one and the same. As above indicated, the sole purpose of the act was to avoid the confusion incident to the new company having the same name as the old company. Besides that, the Texas Supreme Court, in construing this act, substantially held that the act in question created a new corporation, and therefore that the general act of 1854 did not apply to it, for the reason that it was intended to apply to corporations then in existence. (G., H. & S. A. R'y Co. vs. State, 87 Texas, 352-4.)

The only question remaining is to consider whether the new corporation had acquired the rights of the old. If it be conceded that it did acquire the rights of the sold out corporation, it becomes necessary to inquire what those rights were. Remembering that the act under which the land is claimed was passed January 30th, 1854, the Buffalo Bayou, Brazos & Colorado Railway Company was authorized to accept the terms of the general act by a special act approved February 4th, 1854, which reads as follows:

"Be it enacted by the legislature of the State of Texas: That the Buffalo Bayou, Brazos & Colorado Railway Company shall be entitled to all of the rights, privileges and benefits accruing from any general law or laws that have or may hereafter be passed by this State to encourage the construction of railways, in the same manner and to the same extent as if the gauge of said road was the same now fixed, or which may hereafter be fixed upon by this State." Special Acts 1854, p. 69.

To that was added, on the same date, the following supplement:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That if the Buffalo Bayou, Brazos & Colorado Railway Company shall avail itself of the act to which this is a supplement, or accept any donation of land from the State, they shall not be entitled to receive any such donations from the State under the provisions of this law, or any law that has heretofore been passed for their benefit, for any portion of their road which shall not be completed and ready for use within ten years from and after the passage of this act. Provided, that such company shall restrict itself to the following route, viz: To an extension of their existing road to Austin, in the county of Travis, across the Brazos river at any point between the town of Richmond, in Fort Bend County, and Hidalgo Falls, in Washington County; and with the right to extend their road from Austin to connect with any road running north of Austin towards the Pacific ocean; provided, that such con-

BLEED THRO

nections be made between the 96th and 98th parallels of longitude; and provided further, that said company shall have no right to build branches from their main line."

These two acts passed on the same date, the one authorizing the road to accept the benefits of the general act, and the other restricting its rights thereunder, must be construed as a whole —indeed as the same act. By these two acts must the rights of the "sold out" company be measured. There can be no doubt about what they are. The company was authorized to build a road to Austin, in the county of Travis, and extend northward to some line of road going west to the Pacific ocean; and further provided, that the company should have *no right to build branches* from its main line. The old company, then, had no right to build the road in question. It had no right to build any branch lines.

The case, then, stands this way: The State contracted with the "sold out" company to the effect that if it build a line of road to Austin, Texas, that it would give to the road sixteen sections of land per mile. But the State was careful to stipulate that the railroad company must restrict itself to this particular line; and further, that no branch roads should be built. This was the legal status of the State and the sold out company. Now, a new corporation was formed. That corporation had no right to build the road in question. Therefore, the old corporation had no right to earn land for building the road in question. The State never contracted with it to build that road, but a different one. It is too clear for argument, therefore, that the old "sold out" company had no right to earn lands that the new company claimed under this act, and therefore the new company cannot claim these lands under any assignment of the old contract, or any acquisition of the rights of the old company. Section 12 of the charter of the new company emphasizes this point. It provides:

"That nothing in this act contained shall be construed as reviving or renewing any land grant to said company for road hereafter to be completed, which it does not possess by existing law."

As the old company did not possess the right by existing law

GH POOR COPY

to build a branch line, nor to build the road in question, then section 12 of the charter applies, and absolutely prohibits it from earning. It is therefore clear that the acts of the Texas legislature cannot be properly construed without reaching these conclusions:

First.—That the Buffalo Bayou, Brazos & Colorado Railway Company denominated the "old" company, or "sold out" company, is not identical with the Galveston, Harrisburg and San Antonio Railway Company. They are separate and distinct corporations.

Second.—That the old, sold out company, had no right to build a line of railroad from Columbus to San Antonio, and thence west, but was expressly restricted to a line extending northward to Austin, and thence north to intersect with a road leading to the Pacific ocean, near parallel 96 of longitude.

Third.—That in creating the new corporation, the charter expressly negatived the idea that it was the intention of the legislature to deny it any land grants.

Fourth.—That the authority to build the road from Columbus to San Antonio for which the land is herein claimed, was not given, and no contract authorizing its construction was made by the company until 1870, at which time the Constitution of Texas forbade the granting of lands to railroad companies.

From these conclusions, another necessarily follows, and that is, that in as much as the State of Texas had entered into no contract with the Galveston, Harrisburg & San Antonio Railway Company by which it agreed to give it land for the construction of a line of road from Columbus to San Antonio, and thence west, prior to 1870, there was no contract for the Constitution of 1869 to operate upon, and therefore there was none for it to impair.

SECOND COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS OF ERROR.

Section 11 of the act in question did not carry with the new company the right to earn land grants even if it existed in the old.

Authorities:

Memphis & Little Rock R. R. Co. vs. R. R. Commission, 113 U. S., 465.

Memphis & Little Rock R. R. Co. vs. R. R. Commission, 112 U. S. 609

Bank of Commerce vs. Penn. 163 U. S. 416, 4

FIRST COUNTER-PROPOSITION UNDER FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

The Court of Civil Appeals did not err in holding that the Galveston, Harrisburg & San Antonio Railway Company was not entitled to the land in question by reason of its having constructed the railroad from San Antonio west to El Paso, for which it had received no land, although the statute since 1876 authorized it to earn land for such construction, which statute was repealed in 1882. Because the certificates which were located on the land in question were issued for building a railroad from Columbus to San Antonio.

Statement: The record clearly discloses without any contradiction that the railroad acquired the certificates in question for constructing the road between Columbus and San Antonio. That these certificates so acquired were located on the land in question; and the land was surveyed by virtue of these certificates. (Record pp. —, —.) No certificates were obtained for the construction of the road west of San Antonio. The laws of Texas have always required the issuance of certificates by the land department, and the location and survey by proper officers. If the certificates are invalid, or the surveys are not made, the title to the land fails.

Authorities:

Bacon & Graves vs. State of Texas, 165 U. S., ——

G. H. & S. A. R'y Co. vs. State of Texas, 89 Texas, 340.

Argument: Put most strongly for plaintiff in error, the case may be fairly stated in this form: The plaintiff in error sought and obtained land certificates for building the road from Columbus to San Antonio, and had these certificates located on the

Parrall vs. Great Northern Ry. Co. 161 U. S. 646 - 65-9.

THROUGH POOR COPY

lands in question. The land was surveyed, field notes returned to the general land office, etc. The State officers had no authority to issue the certificates in question, because the Constitution absolutely forbade the same. The section in question reads as follows:

"The Legislature shall not hereafter grant lands to any person or persons nor issue any certificates for land by sale at the land office, except to actual settlers upon the same, and in lots not exceeding 160 acres." Sec. 6, Art. X, Constitution of 1869. Sayles' Texas Statutes, Vol. 4, p. 444.

It is plain, therefore, that no title was obtained to the land in question, by these acts. Plaintiff in error subsequently build a line of road west from San Antonio. It did not obtain any certificates therefor. Not having obtained any land certificates, of course they did not have the land in question surveyed. It seems too clear for argument that the title to Texas lands cannot be obtained in that way. The court's attention is particularly called to the opinion of the Supreme Court of the State upon this question. Questions were certified by the Court of Civil Appeals to that court for instruction. The question upon this point was as follows:

"Question 3. If the laws as to land grants to railroads passed prior to 1869 were repealed by the Constitution of that year, can appellant interpose and maintain in this suit the equitable defense that if the certificates issued for that portion of the road between the Colorado and the Guadalupe rivers from 1870 to 1876 were illegally obtained, that the State is in no position to ask the relief sought by reason of the fact that appellant has earned the certificates for said 163 miles of road?" To this question the Supreme Court responded:

"Referring to the third question certified by the Court of Civil Appeals, we are of the opinion that it is no defense to an action of the State for the recovery of the lands involved in this suit, that the company may have been entitled to certificates for the 163 miles of additional road constructed under the law of 1876. It acquired no title either legal or equitable to the lands in controversy by causing them to be surveyed and patented under the certificates granted for the San Antonio extension. To make its right to lands earned by the additional construction effectual for any purpose, it must have procured its certificates and located them upon some portion of the public

BLEED TH

domain not reserved from the location of such certificates. Our complicated and ever varying laws in regard to the appropriation of the public domain have probably given rise to more questions affecting the location of lands than have ever arisen in any other jurisdiction, and yet we know of no case in this court in which it has ever been ruled that the claimant of land against the State under a location made by virtue of a void certificate has any equity in the premises by reason of being the possessor of another valid certificate." G., H. & S. A. Ry. Co. v. State of Texas, 89 Texas, 340 350, 355-56.

Such is the settled law of the land.

To further illustrate the absurdity of this contention of the plaintiff in error, let us suppose that the Galveston, Harrisburg & San Antonio Railway Company did construct a number of miles of railroad west of San Antonio, and that it was constructed in accordance with the laws of Texas, whereby it became entitled to certificates for sixteen sections of land per mile. Let us further suppose that it applied to the land department for these certificates and obtained them, but failed to have them located on any Texas lands. That is to say, failed to apply to the surveyor and have some definite portion of the public domain surveyed and field notes returned to the land office so that the evidence of the appropriation might be by the land department issued to the railroad company. It must be too plain for argument that under the decisions of the State courts the railroad company can not thereby acquire any title to any land. It must be remembered that this contention of plaintiff in error is based upon the statute of 1876. The Constitution, therefore, of 1875, applied in that case. That Constitution, in dealing with this question, contained the following provision:

"All genuine land certificates hereafter issued by the State shall be surveyed and returned to the general land office within five years after issuance, or be forever barred." (Latter part of Sec. 2, Art. XIV, Texas Constitution of 1875; Sayles' Texas Statutes, Vol. 4, p. 573.)

It is plain, therefore, that if these certificates had been obtained and not located on the land, they would have been forever barred. Surely by not applying for land certificates, they would be in no more favorable situation than if they had applied and obtained them, and failed to have them located. But be

OUGH POOR COPY

this as it may. It is clear that no land could be patented in Texas at any period of its history unless the certificates were first obtained, the land surveyed by virtue of these certificates, the field notes returned to the land office so that it might be appropriated by the State to the use of the particular individual thus seeking to obtain it.

Authorities:

FIRST COUNTER-PROPOSITION UNDER SIXTH AND SEVENTH ASSIGNMENTS OF ERROR.

The court did not err in holding that the Act of 1882, which repealed the act of 1876, granting sixteen sections of land per mile to railroads, did not impair the contract of plaintiff in error, which was involved in this suit. Because the lands in question were not sought to be appropriated in the way pointed out by the laws of Texas as earned under the Act of 1876, but as earned under the Act of 1854, and those amendatory and supplemental thereof.

Authorities:

The eighth, ninth, tenth and eleventh assignments of error are but reiterations of the same contention—that the plaintiff in error was entitled to the land in question by virtue of its constructing the road west of San Antonio. It is therefore not deemed necessary to add anything more in reference to it, except to repeat in as much as the issuance of land certificates and the location of the certificates, and the surveying of the land was, under the laws of Texas—the Act of 1876 as well as 1854—necessary to the acquisition of title; that in as much as no certificates were issued under the Act of 1876 and no surveys made, that therefore plaintiff in error has no right to any specific portion of Texas' public domain by reason of said Act of 1876. To ask this court to hold that the plaintiff in error may acquire title

BLEED THR

to the land in controversy by virtue of the construction of a railroad under the Act of 1876, although no certificates were obtained thereunder, no land surveyed thereunder, is equivalent to asking this court to qualify the provisions of the Texas Statutes which make the issuance of the certificate and the location thereof on specific portions of her territory as conditions precedent to the obtaining of any title, either legal or equitable, from the State, to be null and void. This I apprehend this court will not do.

FIRST COUNTER-PROPOSITION UNDER TWELFTH ASSIGNMENT OF ERROR.

The Court of Civil Appeals did not err in affirming the judgment in question.

Statement: For statement, see statement of the case.

Respectfully submitted,

M. M. CRANE, Atty.-Gen'l.,
Attorney for Defendant in Error.

UGH POOR COPY